

June 27, 2011

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board Panel

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| In the Matter of |) | |
| |) | |
| Entergy Nuclear Generation Company and |) | Docket No. 50-293-LR |
| Entergy Nuclear Operations, Inc. |) | ASLBP No. 06-848-02-LR |
| |) | |
| (Pilgrim Nuclear Power Station) |) | |

**ENTERGY’S ANSWER OPPOSING PILGRIM WATCH REQUEST
FOR HEARING ON A NEW CONTENTION REGARDING
INADEQUACY OF ENVIRONMENTAL REPORT, POST-FUKUSHIMA**

I. INTRODUCTION

Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively “Entergy”) hereby oppose the Pilgrim Watch Request For Hearing on A New Contention Regarding Inadequacy [sic] of Environmental Report, Post-Fukushima, submitted on June 1, 2011 (“PW Request”).¹ Pilgrim Watch alleges that the Environmental Report (“ER”) supporting the Pilgrim Nuclear Power Station (“PNPS” or “Pilgrim”) license renewal is inadequate because the ER’s severe accident mitigation alternatives (“SAMA”) analysis purportedly ignores “the probability of both containment failure, and subsequent larger off-site consequences due to failure of the direct torus vent (DTV) to operate” brought to light by the Fukushima Daiichi accident. PW Request at 1.

Pilgrim Watch’s Request should be denied for a host of reasons: First, neither the Request nor the appended Gundersen Affidavit address or meet the standards for reopening a

¹ Appended to the PW Request (at pp. 33-34) is the Affidavit of Arnold Gundersen (“Gundersen Affidavit”). As discussed below, while captioned “Affidavit of Arnold Gunderson,” the document does not appear to be a sworn document as it does not state that it was made under penalty of perjury.

closed record to litigate a new contention.² This failure by itself requires denial. The Pilgrim Watch Request also fails to meet the standards governing a late-filed contention, and fails to meet the standards for an admissible contention because it raises issues immaterial to this proceeding, lacks sufficient support, and fails to demonstrate a genuine dispute with the Pilgrim license renewal application.

II. BACKGROUND

A. STATEMENT OF CASE

This proceeding involves the application submitted by Entergy in January 2006 seeking renewal of the operating license for Pilgrim (“Application”).³ On May 25, 2006, Pilgrim Watch filed an intervention petition seeking the admission of five contentions.⁴ This Board admitted two of the five contentions proffered by Pilgrim Watch – Contention 1 relating to buried piping, and Contention 3 challenging certain input data used in the Pilgrim SAMA analysis.⁵

The NRC Staff reviewed the Application and issued the final environmental impact statement (“FEIS”) in July 2007⁶ and the final safety evaluation report (“SER”) in November 2007.⁷ Following summary disposition of Contention 3,⁸ the Board held a hearing on

² Attached to this Answer is the Declaration of Joseph R. Lynch, Lori Ann Potts and Dr. Kevin R. O’Kula in Support of Entergy’s Answer Opposing Pilgrim Watch Request For Hearing on A New Contention Regarding Inadequacy of Environmental Report, Post-Fukushima (June 27, 2011) (“Entergy Declaration” or “Entergy Decl.”). Among other things, Mr. Lynch, Ms. Potts, and Dr. O’Kula show that Pilgrim Watch’s Request fails to demonstrate that a materially different result would be likely under 10 C.F.R. § 2.326(a)(iii), one of the criteria for reopening a closed record.

³ See 71 Fed. Reg. 15,222 (Mar. 27, 2006).

⁴ Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006) (“Petition to Intervene”).

⁵ Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 N.R.C. 257, 349 (2006).

⁶ NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 29 Regarding Pilgrim Nuclear Power Station (July 2007) (“NUREG-1437”).

⁷ NUREG-1891, Safety Evaluation Report Related to the License Renewal of Pilgrim Nuclear Power Station (Nov. 2007).

⁸ Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-07-13, 66 N.R.C. 131 (2007).

Contention 1 and then closed the evidentiary record on that contention.⁹ It then issued a decision resolving that remaining contention in Entergy's favor and terminating the proceeding.¹⁰

In CLI-10-11, the Commission reversed the summary disposition of the portion of Contention 3 that raised meteorological modeling issues associated with the SAMA analysis.¹¹ The Commission therefore remanded Contention 3, "as limited by [its] ruling," to the Board for hearing.¹² In CLI-10-14, the Commission denied Pilgrim Watch's request for review of all other Licensing Board decisions that Pilgrim Watch had challenged on appeal.¹³

Following the remand, Pilgrim Watch sought repeated delays in the scheduling of the hearing on the remanded issues while it sought unsuccessfully to expand the scope of the remand to include issues never raised as part of its contention and issues that had already been resolved. See, e.g., CLI-10-15¹⁴ (denying Pilgrim Watch motion for reconsideration); CLI-10-28¹⁵ (denying Pilgrim Watch motion for clarification). Eventually, in CLI-10-28, the Commission stated:

We remanded contention 3 to the Board in March 2010. We expect the Board to make full use of its broad authority under our rules to establish and maintain a fair and disciplined hearing process, avoiding extensions of time absent good cause, unnecessary multiple rounds of briefs, or other unnecessary delay. We urge the Board and parties to work together to bring the proceeding to timely closure.

⁹ Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1) (June 4, 2008) at 4.

¹⁰ Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-08-22, 68 N.R.C. 590, 610 (2008).

¹¹ Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. ___, slip op. at 14, 18 (Mar. 26, 2010) ("CLI-10-11").

¹² Id. at 3.

¹³ Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 N.R.C. ___, slip op. at 3, 39 (June 17, 2010) ("CLI-10-14").

¹⁴ Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-15, 71 N.R.C. ___, slip op. (June 17, 2010) ("CLI-10-15").

¹⁵ Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-28, 71 N.R.C. ___, slip op. (November 5, 2010) ("CLI-10-28").

CLI-10-28 at 2.

Having been unsuccessful in its efforts to expand the remanded contention, Pilgrim Watch then commenced a campaign of requests for hearing on new contentions. To date, Pilgrim Watch has filed five such requests, including the one to which this Answer responds.¹⁶ In each case, Pilgrim Watch has either refused to even mention the Commission's standards for reopening to admit new contentions, or failed to comply with the procedural requirements. In addition, since completion of the hearing record on the remanded contention in March 2011,¹⁷ Pilgrim Watch has filed five post-hearing memoranda improperly attempting to expand the closed record.¹⁸ These repeated attempts to delay the completion of this proceeding, now in its sixth year, should not be countenanced.

B. APPLICABLE LEGAL STANDARDS

The NRC does not look with favor on amended or new contentions filed after the initial filing. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 638 (2004). As the Commission has repeatedly stressed,

¹⁶ Pilgrim Watch Request for a Hearing on a New Contention (Nov. 29, 2010); Pilgrim Watch Request for a Hearing on a New Contention: Inadequacy of Entergy's Aging Management of Non-Environmentally Qualified (EQ) Inaccessible Cables at Pilgrim Station (Dec. 13, 2010); Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy's Aging Management Program of Non-Environmentally Qualified (Non-EQ) Inaccessible Cables (Splices) at Pilgrim Station (Jan. 20, 2011); Pilgrim Watch's Request for Hearing on Post Fukushima SAMA Contention (May 12, 2011).

¹⁷ On February 23, 2011, the Board granted the parties' Joint Motion requesting that the remanded Contention 3 be resolved solely on the parties' pre-filed testimony and exhibits, with no evidentiary hearing. Revised Notice and Order (Regarding Hearing and Oral Argument) (Feb. 23, 2011). On March 4, 2011, the parties filed their findings of fact and conclusions of law on remanded Contention 3 and on March 9, 2011, the Board heard closing arguments on remanded Contention 3.

¹⁸ Pilgrim Watch Memorandum Regarding Fukushima (March 12, 2011); Pilgrim Watch's Post Hearing Memorandum (March 28, 2011); Pilgrim Watch Memorandum – Entergy's Incorrect and Misleading Information Regarding Proven Tests to Detect Cable Insulation Degradation (April 11, 2011); Pilgrim Watch Memorandum – Entergy's Incorrect and Misleading Information Regarding Proven Tests to Detect Cable Insulation Degradation – Video Supplement (April 12, 2011). Entergy has objected to these filings. Entergy's Objection to Pilgrim Watch's Post Hearing Memoranda and Other Unauthorized Filings (Apr. 22, 2011). Since Entergy's Objection, Pilgrim Watch filed the Pilgrim Watch Memorandum – Submerged Cables (June 23, 2011).

[o]ur contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners “who must examine the publicly available material and set forth their claims and the support for their claims at the outset.” There simply would be “no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements” and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 271-72 (2009) (emphasis added) (citations omitted).

Where, as here, the adjudicatory record has been closed, the Commission’s rules specify that a motion to reopen that record to consider additional evidence – including evidence on a new contention (see 10 C.F.R. § 2.326(d)) – will not be granted unless the following criteria are satisfied:

- (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
- (2) The motion must address a significant safety or environmental issue; and
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. § 2.326(a). Further, under the NRC rules,

The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

10 C.F.R. § 2.326(b) (emphasis added). As discussed later, Pilgrim Watch has not met any of these standards and requirements.

The Commission has repeatedly emphasized that “[t]he burden of satisfying the reopening requirements is a heavy one.” Oyster Creek, CLI-09-7, 69 N.R.C. at 287 (citing Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 N.R.C. 1, 5 (1986)). “[P]roponents of a reopening motion bear the burden of meeting all of [these] requirements.” Id. (citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 N.R.C. 218, 221 (1990)). “Bare assertions and speculation . . . do not supply the requisite support.” Id. (citing AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 N.R.C. 658, 674 (2008)).

In addition, where a motion to reopen relates to a contention not previously in controversy, a motion to reopen must also satisfy the standards for non-timely contentions in 10 C.F.R. § 2.309(c). 10 C.F.R. § 2.326(d).¹⁹ Section 2.309(c) provides that non-timely contentions will not be entertained absent a determination by the Board that the contentions should be admitted based upon a balancing of the following factors:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

¹⁹ See also Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 N.R.C. 115, 125 (2009); Oyster Creek, CLI-08-28, 68 N.R.C. at 668.

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1).

In keeping with the Commission's disfavor of contentions after the initial filing, these factors are "stringent." Oyster Creek, CLI-09-7, 69 N.R.C. at 260, citing Florida Power & Light Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, et al.), CLI-06-21, 64 N.R.C. 30, 33 (2006). "Late petitioners properly have a substantial burden in justifying their tardiness." Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 N.R.C. 273, 275 (1975).

Commission case law places most importance on whether the petitioner has demonstrated sufficient good cause for the untimely filing. Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 N.R.C. ___, slip op at 4 (Mar. 26, 2010) ("CLI-10-12"); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-02, 51 N.R.C. 77, 79 (2000); Millstone, CLI-09-5, 69 N.R.C. at 125. Indeed, failure to demonstrate good cause requires the petitioner to make a "compelling" showing with respect to the other factors. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 N.R.C. 156, 165 (1993). In other words,

A petitioner's showing must be highly persuasive; it would be a rare case where [the Commission] would excuse a non-timely petition absent good cause.

Watts Bar, CLI-10-12 at 4 (footnote omitted). As discussed later, Pilgrim Watch has not shown good cause for its filing, and a balance of the lateness factors weighs against admitting this late-filed contention.

Finally, any new contention must also satisfy the standards for admissibility in 10 C.F.R. § 2.309(f)(1). These standards too are to be enforced rigorously. “If any one . . . is not met, a contention must be rejected.” Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3), CLI-91-12, 34 N.R.C. 149, 155 (1991) (citation omitted); USEC, Inc. (American Centrifuge Plant), CLI-06-9, 63 N.R.C. 433, 437 (2006) (“These requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements.” (footnotes omitted)). A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information. Palo Verde, CLI-91-12, 34 N.R.C. at 155; Oyster Creek, CLI-09-7, 69 N.R.C. at 260 (the contention admissibility rules “require the petitioner (not the board) to supply all of the required elements for a valid intervention petition” (emphasis added) (footnote omitted)). As discussed below, Pilgrim Watch also fails to meet these requirements.

III. PILGRIM WATCH’S REQUEST SHOULD BE DENIED

Pilgrim Watch claims, erroneously, that when preparing the Pilgrim SAMA analysis, Entergy “followed conventional NRC practice” and assumed “very low probabilities” that an accident could occur, and that in the event of an accident, Entergy assumed that there would be no “[p]ressure build-up within the containment; [a] significant delay in even attempting to vent the containment because of operator error; [f]ailure/[i]noperability of the [DTV]; and [c]atastrophic failure of the containment.” PW Request at 1-2; see also id. at 6, 29. As a result, Pilgrim Watch contends that Entergy must “conduct a new analysis – based on what Fukushima has taught about reality.” Id. at 2.

As discussed in the sections below, Pilgrim Watch’s Request and claims are factually incorrect because the Pilgrim SAMA analysis is based on a site specific estimate of accident probabilities that fully takes into account pressure build-up within the containment, operator error in failing to vent the containment, failure or inoperability of the DTV itself, and catastrophic failure of the containment. Each of these topics is fully addressed in the Pilgrim SAMA analysis, and nowhere in its contention does Pilgrim Watch challenge the adequacy of the SAMA analysis of these issues. As such, Pilgrim Watch fails to meet the standards governing reopening a closed hearing record, considering a late-filed contention, and admitting a contention.

A. PILGRIM WATCH FAILS TO MEET THE STANDARDS FOR A MOTION TO REOPEN IN 10 C.F.R. § 2.326

Pilgrim Watch’s Request does not address and clearly fails to satisfy the standards for reopening a closed record in 10 C.F.R. § 2.326. It is not supported by an affidavit that meets the requirements in 10 C.F.R. § 2.326(b), and it fails to meet all of the requirements in 10 C.F.R. § 2.326(a)(1)-(3). Each of these failures by itself requires that the PW Request be rejected.

1. The Gundersen Affidavit and the Pilgrim Watch Contention Fail to Address the Standards for Reopening

The Gundersen Affidavit that Pilgrim Watch appends to its Request neither addresses nor satisfies 10 C.F.R. § 2.326(b). 10 C.F.R. § 2.326(b) requires that a supporting affidavit address separately “[e]ach of the criteria” in Section 2.326(a) and provide “a specific explanation of why [each] has been met.” Mr. Gundersen’s Affidavit²⁰ nowhere mentions the relevant Section 2.326(a) criteria, let alone provides a specific explanation of why each has been met. This defect is alone sufficient grounds to reject Pilgrim Watch’s Request. Texas Utilities Electric Co.

²⁰ It is not clear that Mr. Gunderson’s “Affidavit” is even a sworn document. Although it states that it was “[e]xecuted in Accord with 10 CFR 2.304 (d),” it does not state that it was made under penalty of perjury.

(Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 N.R.C. 62, 76 (1992), citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 N.R.C. 89, 93-94 (1989).

Similarly, Pilgrim Watch's Request fails to address the reopening criteria. Instead, Pilgrim Watch repeats its mistaken claim made in connection with its other late-filed contentions that the standards for reopening do not apply because the record has not been closed with respect to previously unlitigated issues. PW Request at 30. This argument is incorrect. There is simply no merit to Pilgrim Watch's assertion that the record on remand is now "open until and unless the Board and the Commission close it with respect to everything involved in this proceeding." Id. at 31 (emphasis added). The standards for reopening apply not only when a party is seeking to introduce new evidence on a previously admitted contention after the evidentiary record is closed, but also when a party is seeking to introduce a new contention after the record has been closed. This fact is made clear by 10 C.F.R. § 2.326(d) which expressly states that "[a] motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c)." 10 C.F.R. § 2.326(d) (emphasis added). Arguing that the record has not been closed with respect to previously unlitigated issues would render 10 C.F.R. § 2.326(d) meaningless. Indeed, in a recent decision rejecting a petition for review of another reactor's license renewal, the Third Circuit squarely addressed this precise issue and explicitly upheld the application of the reopening standards to new contentions not previously in controversy among the parties. New Jersey Env'tl. Fed'n v. NRC, No. 09-2567, 2011 WL 1878642 at *10-11 (3d Cir. May 18, 2011).

Pilgrim Watch also erroneously challenges the Commission's discretion on how to implement NEPA by claiming that NEPA "requires that the ASLB look at new and significant

information.” PW Request at 31, citing 40 C.F.R. § 1500.1(c). As such, Pilgrim Watch is claiming that the Commission’s procedural requirements for late-filed contentions and reopening a closed record cannot be applied here because they are overridden by NEPA. Such a claim is clearly wrong. “[T]he only procedural requirements imposed by NEPA are those stated in the plain language of the Act.” Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 548 (1978) (citation omitted). Although NEPA requires that an agency fully consider environmental issues, NEPA does not itself provide for a hearing on those issues. Union of Concerned Scientists v. NRC, 920 F.2d 50, 56 (D.C. Cir. 1990) (“UCS II”). See also San Luis Obispo Mothers for Peace v. NRC, 635 F.3d 1109, 1115 (9th Cir. 2011). Nor does NEPA alter the procedures employed (or not employed) by an agency for considering environmental issues. See UCS II 920 F.2d at 56 (citing Vermont Yankee, 435 U.S. at 548). As clearly stated by the First Circuit:

[A]lthough NEPA does impose an obligation on the NRC to consider environmental impacts of the Pilgrim and Vermont Yankee license renewal before issuing a final decision, the statute does not mandate how the agency must fulfill that obligation. See 42 U.S.C. § 4332; Balt. Gas & Elec. Co., 462 U.S. at 100-01, 103; Vt. Yankee, 435 U.S. at 548. Beyond "the statutory *minima*" imposed by NEPA, Vt. Yankee, 435 U.S. at 548, 98 S. Ct. 1197 the implementing procedures are committed to the agency's judgment. In theory, what fetters the agency's decision-making process and ensures ultimate compliance with NEPA is judicial review.

Massachusetts v. NRC, 522 F.3d 115, 130 (1st Cir. 2008) (emphasis in original).

Thus, it is clear that NEPA does not prescribe how the Commission must consider proffered evidence of new and significant information. Accordingly, NEPA does not require that the NRC abandon its procedures, such as its procedural requirements for reopening a closed record, every time someone alleges new and significant information. UCS II, 920 F.2d at 55 (“it [is] unreasonable to suggest that the NRC must disregard its procedural timetable every time a

party realizes based on NRC environmental studies that maybe there was something after all to challenge it either originally opted not to make or which simply did not occur to it at the outset”) (footnote omitted).²¹

Accordingly, Pilgrim Watch must meet the criteria for reopening a closed record before the Licensing Board can consider its purportedly new and significant information.²² Because Pilgrim Watch has not addressed the criteria for reopening the record, its Request must be denied.²³

2. The Request is Not Timely

Neither Pilgrim Watch nor Mr. Gundersen demonstrate that the Request is timely. Mr. Gunderson’s Affidavit does not even address the issue. Pilgrim Watch claims that its proposed contention is based on “new and significant information from Fukushima,” such as the May 19, 2011 New York Times article. PW Request at 1; PW Request, Exhibit 8. Pilgrim Watch contends that the Fukushima Daiichi accident has revealed that in the event of an accident, Mark I reactors are subject to an increased risk of containment failure should the DTV fail to operate properly, which could lead to “significantly larger volume of off-site radiological releases.” See

²¹ For the NRC’s consideration of purportedly new and significant information, these “procedural processes” include those governing late-filed contentions. UCS II, 920 F.2d at 55 (approving of NRC’s application of the late-filing requirements); Massachusetts v. NRC, 924 F.2d 311, 334 (D.C. Cir.) (same), cert. denied, 502 U.S. 899 (1991). They also include application of the requirements in 10 C.F.R. § 2.326 for reopening a closed record. New Jersey Env’tl. Fed’n v. NRC, No. 09-2567, 2011 WL 1878642 at *10-11 (3d Cir. May 18, 2011) (approving of application of reopening standards to alleged new information); Ohio v. NRC, 814 F.2d 258, 262 (6th Cir. 1987) (same).

²² Pilgrim Watch’s claim that whether it needs to seek to reopen the record is “mute [sic] anyway because Pilgrim Watch has also satisfied the criteria to reopen” (PW Request at 30) is clearly wrong because Pilgrim Watch never supplied the required affidavit with sworn statements that the criteria are satisfied. Furthermore, as discussed infra Pilgrim Watch clearly does not satisfy the required reopening criteria.

²³ Pilgrim Watch also asserts that, even if the record has been closed, the Board has a “duty to reopen *sua sponte* . . . when it becomes aware . . . of a significant unresolved safety issue . . .” PW Request at 31 (citing NRC Staff Practice and Procedure Digest). However, the holdings from the cases summarized in the NRC Staff Practice and Procedure Digest have been superseded by Commission regulation. NRC licensing boards do not have the authority to raise issues *sua sponte* absent the Commission’s “approv[al] of an examination of and decision on the matter upon its referral by the” Board. 10 C.F.R. § 2.340(a).

e.g., PW Request at 1-2. However, the bases for Pilgrim Watch's challenges are not new information and they could have been raised long ago, rendering them untimely now.

10 C.F.R. § 2.309(f)(2) states that “[c]ontentions must be based on documents or other information available at the time the petition [to intervene] is to be filed, such as the application [and] safety analysis report.” An intervenor has an “ironclad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention.” Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 N.R.C. 135, 147 (1993) (footnote omitted). Other than new or amended contentions challenging new data or conclusions in the NRC Staff's environmental impact statement (not applicable here), the NRC rules allow new contentions to be filed after this initial filing only with the leave of the presiding officer upon a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2)(i)-(iii). In essence, a proponent of a new contention must show that it could not have raised its contention earlier. Intervenors are not free simply “to add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding.” Oyster Creek, CLI-09-7, 69 N.R.C. at 272 (footnote omitted).

Pilgrim Watch does not demonstrate that it could not have raised this contention earlier. Entergy's SAMA analysis specifically addresses each of the issues that Pilgrim Watch has only

now thought to challenge - the buildup of containment pressure, hydrogen explosion, operator error in failure or delay in attempting to vent the containment, DTV failure or inoperability, potential containment failure or breach, and resulting large offsite consequences. The SAMA analysis has been available since the outset of this proceeding and does, in fact, consider all of the alleged inadequacies raised by Pilgrim Watch.

For example, as explained in the attached Entergy Declaration:

- The Level 2 probabilistic safety assessment (“PSA”) containment event tree (“CET”) Early Containment Failure (“CFE”) node considers that the containment may fail soon after failure of the reactor pressure vessel due to overpressure or hydrogen explosion. See ER Table E.1-5. Thus, the SAMA analysis expressly considers pressure buildup in the containment as well as hydrogen explosion. Entergy Decl. ¶¶ 52, 59-60.
- The subordinate fault tree for the Early Containment Failure node includes operator failures to take action to vent as well as component failures that could result in failure to vent and an early failure of containment. Furthermore, collapsed accident progression bins (“CAPB”) 4 through CAPB 11 include accident sequences in which early containment failure occurs (see ER Table E.1-9). Thus, the buildup of containment pressure due to failure of venting – both an operator’s failure to vent and physical failure of the DTV – contributes to the accident sequences in CAPBs 4 through 11 which lead to radioactive releases. Entergy Decl. ¶ 53.
- Specifically, as shown in ER Table E.1-3, the probability that the operators will fail to vent containment using the DTV is considered in basic event CIV-XHE-FO-DTV. Moreover, multiple failure modes account for physical failure of the venting system. See ER Table E.1-3; Entergy Decl. ¶ 54, Table 1. Thus, both operator error in failure to vent²⁴ and physical failure of the DTV are incorporated into the Pilgrim SAMA analysis. Entergy Decl. ¶ 54.

²⁴ Pilgrim Watch acknowledges that the failure to vent because of operator error is considered in the Pilgrim SAMA analysis. PW Request at 23.

- Furthermore, additional information on operator failure to vent was provided in response to NRC requests for additional information (“RAI”).²⁵ In response to the RAI dated May 22, 2006, Entergy proposed to evaluate a new SAMA to directly address plant operators failing to vent the containment. The proposed SAMA included a passive design direct torus vent instead of the existing direct torus vent. Evaluation of the SAMA determined that it was not cost effective. Entergy Decl. ¶ 77; ENT000007-00-BD01 at 46 of 68 (ADAMS Accession No. ML061930418).
- Hydrogen explosion is considered a credible mechanism for early primary containment failure and therefore contributes to the Early Containment Failure event node, which considers the potential loss of containment integrity at, or before, reactor vessel failure. The PSA fault tree for hydrogen explosion combines initiating event probabilities, component failure probabilities, and human action failure probabilities. Thus, the subordinate fault tree for CFE includes component and operator action failures that could result in a buildup of hydrogen in the primary containment. Entergy Decl. ¶ 59.
- Early containment breach is considered in the Early Containment Failure node of the Pilgrim PSA, which contributes to the accident sequences in CAPBs 4 through 11. The Level 2 model also considers that containment could be breached later in an accident via the Late Containment Failure (“CFL”) node. CAPBs 12 through 15 include accident sequences in which late containment failure occurs. Thus, containment breach contributes to accident sequences in CAPBs 4 through 15. See ER Table E.1-5; Entergy Decl. ¶ 58.
- Furthermore, the Pilgrim SAMA analysis takes into account large radioactive releases. The 19 CAPBs used in the Pilgrim SAMA analysis presented in ER Table

²⁵ Entergy provided supplemental information on its SAMA analysis in four letters responding to NRC requests for additional information (“RAI”) in 2006. These four letters were included as exhibits for Entergy’s January 3, 2011 written presentation on Pilgrim Watch Contention 3 (exhibit numbers indicated in parentheses). License Renewal Application Amendment 4: Response to Request for Additional Information Regarding Severe Accident Mitigation Alternatives for Pilgrim Nuclear Power Station (July 5, 2006) (ADAMS Accession No. ML061930418) (ENT000007-00-BD01); License Renewal Application Amendment 7 (Aug. 30, 2006) (ADAMS Accession No. ML062500117) (ENT000008-00-BD01); License Renewal Application Amendment 9 (Oct. 6, 2006) (ADAMS Accession No. ML062910173) (ENT000009-00-BDN01); License Renewal Application Amendment 10 (Dec. 12, 2006) (ADAMS Accession No. ML070100410) (ENT000010-00-BD01).

E.1-9 represent a range of severe accident releases from small to very large. The source term for each CAPB, including the fraction of the core inventory for each of nine radionuclide groups present in the reactor core that would be released for each CAPB, are set forth in ER Table E.1-11. The CAPBs representing very large severe accident releases far exceed the radioactive releases from Fukushima. Entergy Decl. ¶¶ 47-48, 63-69.

Thus, each of the issues now challenged by Pilgrim Watch as lacking from the Pilgrim SAMA analysis – the buildup of containment pressure, hydrogen explosion, operator error in failure or delay in attempting to vent the containment, DTV failure or inoperability, potential containment failure, and the resulting large offsite consequences – are specifically addressed in the LRA SAMA analysis. Furthermore, this previously available information includes Pilgrim Watch’s so-called “new . . . two pieces of significant information” from Fukushima, i.e., “operators hesitant to use the vent until perhaps too late” and “failure of the DTV itself.” PW Request at 21-22.

Furthermore, Pilgrim Watch is again raising issues that have been previously addressed and rejected. Here, Pilgrim Watch again challenges the Pilgrim SAMA analysis because of the lack of a filter on the DTV.²⁶ This Board rejected these very claims²⁷ at the onset of this proceeding.²⁸ Similarly, Pilgrim Watch attempts to recycle its Contention 1 buried piping challenges,²⁹ which were litigated and resolved.³⁰ This contention is simply another attempt by Pilgrim Watch to delay this proceeding, and must be rejected.

²⁶ PW Request at 17-19.

²⁷ Petition to Intervene at 45-48 (“The faulty SAMA analysis used by Entergy in the Environmental Report caused it to wrongly dismiss mitigation alternatives such as adding a filter to the Direct Torus Vent.”)

²⁸ LBP-06-23, 64 N.R.C. at 338-341.

²⁹ PW Request at 20-21.

³⁰ LBP-08-22, 68 N.R.C at 610.

The availability of this information since before this proceeding commenced means that Pilgrim Watch could have challenged the Pilgrim SAMA analysis as many as five (5) years ago, at the time its Petition to Intervene was filed in May 2006. Pilgrim Watch therefore cannot contend that its contention is timely. Pilgrim Watch had an “ironclad obligation” to examine Entergy’s license renewal application and, notwithstanding the events at Fukushima Daiichi, Pilgrim Watch’s failure to do so does not permit it to raise yet another contention at this late stage. Rancho Seco, CLI-93-3, 37 N.R.C. at 147.

3. No Demonstration of the Existence of a Significant Environmental Issue

Neither Pilgrim Watch nor Mr. Gunderson demonstrates the existence of a significant environmental issue, let alone an “exceptionally grave” issue required for untimely motions to reopen. 10 C.F.R. § 2.326(a)(1)-(2).

Where, as here, Pilgrim Watch seeks to raise untimely issues, it must demonstrate the existence of an “exceptionally grave” issue. 10 C.F.R. § 2.326(a)(1). When promulgating its standards for motions to reopen the record, the Commission relied on longstanding precedent holding that an untimely-raised issue must present “a sufficiently grave threat to public safety.” Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986), quoting Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 A.E.C. 358, 365 n.10 (1973). Nothing about Pilgrim Watch’s Contention, which claims that the environmental analysis supporting license renewal is inadequate and ultimately seeks to challenge Entergy’s SAMA analysis, can be characterized as exceptionally grave. And Mr. Gunderson does not address the existence of a significant environmental issue, let alone an “exceptionally grave” issue, in his Affidavit. Consequently, Pilgrim Watch fails this standard.

Even assuming that Pilgrim Watch has timely raised any issue (which it has not), it still has failed to demonstrate the existence of a significant environmental issue. The Commission equates the standard for raising a significant environmental issue under Section 2.326 with the standard that governs whether supplementation of an EIS is required. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-06-03, 63 N.R.C. 19, 29 (2006) (“PFS”) (holding that claimed additional environmental impacts were “not so significant or central to the FEIS’s discussion of environmental impacts that an FEIS supplement (and the consequent reopening of our adjudicatory record) is reasonable or necessary”). To require supplementation of an EIS, the alleged new and significant information must “paint a ‘seriously different picture of the environmental landscape.” Id. at 28 (emphasis in original) (quoting D.C. Circuit cases). In other words, supplementation is required only when the alleged new and significant information raises a previously unknown environmental concern, “not necessarily when it amounts to mere additional evidence supporting one side or the other of a disputed environmental effect.” Id. Moreover, the Commission has directly held that “bare assertions and speculation . . . do not supply the requisite support” to satisfy the Section 2.326 standards. Oyster Creek, CLI-09-7, 69 N.R.C. at 287 (citing Oyster Creek, CLI-08-28, 68 N.R.C. 658, 674 (2008)). In other words, a “mere showing” that changes to the SAMA analysis results are “possible” or “likely” or “probable” is not enough. Oyster Creek, CLI-08-28, 68 N.R.C. at 670, 674.

With these standards in mind, it is clear that Pilgrim Watch has failed to demonstrate the existence of a significant environmental issue in its NEPA contention. At bottom, Pilgrim Watch offers only mere, unsupported speculation suggesting that Entergy “redo” its SAMA analysis to take into account the potential for DTV inoperability and the potential for containment failure,

further claiming that the results might require additional mitigation measures. PW Request at 2, 21, and 30. Such unsupported speculation is insufficient to demonstrate a significant environmental issue. The Commission has made it abundantly clear that merely asserting that something might turn up to support an intervenor's concerns does not raise a significant issue and is therefore insufficient to restart the hearing process. AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 N.R.C. 461, 486 (2008).³¹

For example, Pilgrim Watch contends, without one whit of support, that Entergy did not properly factor reasonable probabilities of DTV failure or the likely cost of failure into the SAMA analysis. Pilgrim Watch asserts that, had Entergy properly accounted for the costs of such failure, which it claims is "clearly billions of dollars," more SAMAs would likely be justified. PW Request at 22. But, Pilgrim Watch makes no attempt to quantify, nor makes any showing, that further accounting for DTV inoperability or the costs associated with the would-be containment failure could make any difference in the Pilgrim SAMA analysis. Similarly insufficient is Pilgrim Watch's unsupported claim of an "increased probability of a severe accident and larger offsite consequences, both justifying additional mitigation." PW Request at 5. Pilgrim Watch never comes forward with anything other than unsupported, bare assertions and mere speculation that significant increases in offsite consequences are possible and that the SAMA results might be different. Such bare assertions are insufficient to show an exceptionally grave issue for reopening the record. Oyster Creek, CLI-09-7, 69 N.R.C. at 287 (citing CLI-08-28, 68 N.R.C. at 674).

³¹ Similarly, "the Board has no authority to order the Licensee to perform a reanalysis for the purpose of determining whether the record should be reopened" because "'a Board is to decide a motion to reopen on the information before it and has no authority to engage in discovery in order to supplement the pleadings before it.'" Florida Power & Light Co. (Turkey Point Plant, Units 3 & 4) LBP-87-21, 25 N.R.C. 958, 963 (1987), quoting Cleveland Electric Illuminating Co. (Perry Nuclear Plant, Units 1 and 2), CLI-86-7, 23 N.R.C. 233, 235 (1985).

4. No Materially Different Result Would Be Likely

Pilgrim Watch does not demonstrate that a materially different result would have been likely had its newly proffered evidence been considered initially, as required by 10 C.F.R. § 2.326(a)(3). Mr. Gunderson neither mentions this criterion – contrary to 10 C.F.R. § 2.326(b), which requires that a supporting affidavit include a specific explanation of why it has been met – nor provides any information whatsoever in his Affidavit from which any argument on this criterion could be gleaned.

Pilgrim Watch’s Request is equally deficient. Pilgrim Watch has a “deliberately heavy” burden to demonstrate that a materially different result would be likely. Oyster Creek, CLI-08-28, 68 N.R.C. at 674. At this late stage of the proceeding, is it not sufficient simply to raise an issue. Rather, “longstanding agency practice hold[s] that a party seeking to reopen a closed record to introduce a new issue . . . must back its claim with enough evidence to withstand summary disposition when measured against its opponents’ contravening evidence.” Private Fuel Storage (Independent Spent Fuel Storage Installation), CLI-05-12, 61 N.R.C. 345, 348 (2005), citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 A.E.C. 520, 523-24 (1973). This means that “no reopening of the evidentiary hearing will be required if the [documents] submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact.” Id. at 350 (quoting Vermont Yankee, ALAB-138, 6 A.E.C. at 523-24).

Without any support, Pilgrim Watch claims that a materially different result would be likely had this “new and significant information” been available to consider initially because “offsite consequences... would far outweigh the cost of mitigations to reduce risk of containment failure.” PW Request at 29.

But, Pilgrim Watch provides no evidentiary support for its claim. First, the articles from the various websites carry no evidentiary weight.³² The authors are not part of this proceeding and are, therefore, anonymous. Moreover, Pilgrim Watch otherwise provides no information demonstrating that the unaccounted for authors have the requisite education, training, or experience to support the assertions concerning the buildup of containment pressure, hydrogen explosion, DTV failure or inoperability, failure or delay in attempting to vent the containment because of operator error, potential containment failure, and the resulting offsite consequences, on which Pilgrim Watch relies. As the Appeal Board succinctly stated long ago, “[b]ecause the competence (or even the existence) of unidentified individuals is impossible to determine, statements of anonymous persons . . . cannot be considered as evidence to support a motion” to reopen the record. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 N.R.C. 1361, 1367 n.18 (1984).³³

Second, Mr. Gunderson has no qualifications to support Pilgrim Watch’s concerns regarding DTV inoperability or containment failure. Aside from the fact that it is not clear whether Mr. Gunderson has provided a sworn statement, a review of his Affidavit indicates that he lacks the requisite expertise in DTV reliability, containment failure, or SAMA analysis. Nowhere does Mr. Gunderson demonstrate that he has any education, knowledge, or experience with the design, construction, or inspection DTV systems or containment buildings. Likewise, he fails to demonstrate that he has any education or knowledge of, or experience with, SAMA analysis. Mr. Gunderson does not purport to hold any certifications or other qualifications in

³² Pilgrim Watch relies on numerous news articles and blogs from the internet whose authors are unidentified and anonymous. See PW Request, Exhibits 2, 6-10.

³³ Pilgrim Watch also relies on several NRC documents to support its contention. While possibly providing some background and context to the issues raised, all of the documents were available to Pilgrim Watch at the time it filed its Petition to Intervene. Furthermore, the documents do not discuss the adequacy of the Pilgrim SAMA analysis, which is what Pilgrim Watch challenges in its contention.

these fields. Indeed, none of the areas in which he has worked, as identified in paragraph 7 of his Affidavit, appears relevant to DTV systems, containment buildings, or SAMA analysis.

Moreover, Mr. Gundersen overstates his previous experience in NRC licensing proceedings. Mr. Gundersen asserts that he has “qualified as an expert witness before the NRC ASLB relating [to] the proposed uprate at the Entergy Nuclear Vermont Yankee Nuclear Power Station.” Gundersen Affidavit at ¶ 5. Aside from the fact that Mr. Gundersen fails to explain how alleged expertise in an uprate proceeding would qualify him as an expert on license renewal SAMA analysis, Mr. Gundersen’s assertion is misleading. Mr. Gundersen withdrew as a witness in the Vermont Yankee uprate proceeding before he filed any testimony in that proceeding. See Docket No. 50-271-OLA, Transcript (Telephone Conference) at 716-17 (Jan. 24, 2006) (ADAMS Accession No. ML060310281). Therefore, Mr. Gundersen never qualified as an expert witness and never testified in the Vermont Yankee uprate proceeding.

Similarly, Mr. Gundersen’s statement that he was a “Senior Vice President for a nuclear licensee” (Gundersen Affidavit at ¶ 4) is an overstatement to the extent that it may suggest that he held that position at a nuclear power plant. As indicated in his Curriculum Vitae,³⁴ Mr. Gundersen has never been an officer at a nuclear plant. Rather, it appears that he was an officer at a vendor, Nuclear Energy Services, which may have held a minor materials license. This provides no basis to establish any qualifications to testify to the reliability of the DTV, containment failure, or SAMA analysis. In short, absent an appropriate sponsor for its assertions, Pilgrim Watch has failed to carry its heavy burden here.

³⁴ The PW Request did not include Arnold Gundersen’s Curriculum Vitae with its Request, but it was made part of the record for Pilgrim Watch’s buried piping claim. See Pilgrim Watch Presents Statements of Position, Direct Testimony and Exhibits Under 10 CFR 2.1207, Exhibit 1, Arnold Gundersen Declaration and CV (March 3, 2008) (ADAMS Accession No. ML080740410).

Moreover, as the attached Entergy Declaration demonstrates, there is no genuine unresolved issue of fact, as follows.

First, Pilgrim Watch’s claims that “[a]ll three” of the direct torus vents at Fukushima Daiichi Units 1-3 “failed” to operate and as a result “all three containments failed” are factually incorrect.³⁵ As explained in Entergy’s Declaration, an official report prepared by the Government of Japan (“Fukushima Report”) explains what happened with respect to the operation of the DTVs as can best be determined at this time. Entergy Decl. at ¶¶ 19-25. Furthermore, with respect to what is known about the operation of the DTVs, the Fukushima Report prepared by the Government of Japan is consistent with a separate report of the Fukushima accident prepared by the International Atomic Energy Agency. These official reports show as follows:

- Contrary to Pilgrim Watch’s assertions that all three DTVs failed, DTV venting operations were successfully undertaken at Fukushima Unit 1 and Unit 3. For Unit 1, the Report states that “[w]et well venting of the PCV was carried out at 14:30 on March 12.” Fukushima Report at 10. Although work to open the vent “proceeded with difficulty” due to high radiation, TEPCO judged that venting had been achieved since the PCV pressure had been reduced by 14:30 on March 12. Id. at IV-34, IV-40 – IV-41. See also id. at VI-2. For Unit 3, “TEPCO carried out wet venting” at 08:41 on March 12, and then again at 05:20 on March 14. Id. at IV-34, IV-73. See also id. at 13 (“A wet well vent operation of the PCV was carried out at 05:20 on March 14”); VI-2 (describing the increase in radiation levels detected after Unit 3 was vented). Venting was also initiated at Unit 2, but it is uncertain whether the venting was successful. Entergy Declaration at ¶¶ 19-25.

³⁵ PW Request at 2; see also id. at 6, 30.

- Furthermore, Pilgrim Watch’s claim that “all three containments failed” catastrophically for Units 1, 2, and 3 is incorrect.³⁶ Pilgrim Watch, and its purported expert Mr. Gundersen, appear to misunderstand that, whereas the reactor building structures (or secondary containments) for Fukushima Units 1 and 3 were damaged, these events do not evidence failure of the Fukushima Daiichi primary containment structures which house the reactor vessel. Contrary to Pilgrim Watch’s claim, Units 1 and 3 continue to contain the overwhelming majority of the radioactive inventory.³⁷ Entergy Decl. at ¶¶ 34-41.

Second, as discussed above, each of the issues challenged by Pilgrim Watch as lacking from the Pilgrim SAMA analysis – the buildup of containment pressure, hydrogen explosion, operator error in failure or delay in attempting to vent the containment, DTV failure or inoperability, potential containment failure, and the resulting large offsite consequences – are fully addressed in the LRA SAMA analysis. Entergy’s Declaration sets forth the adequacy of the Pilgrim SAMA analysis with respect to each of these challenges. In summary:

- Build up of Pressure: The SAMA analysis expressly considers pressure buildup in the containment as well as hydrogen explosion. Entergy Decl. ¶¶ 52, 59-60.
- Operator Error and DTV Failure: Both operator error in failure to vent and physical failure of the DTV are incorporated into the Pilgrim SAMA analysis. Entergy Decl. ¶ 54. Furthermore, the buildup of containment pressure due to failure of venting – both an operator’s failure to vent and physical failure of the DTV – contributes to the accident sequences in CAPBs 4 through 11 which lead to radioactive releases. Entergy Decl. ¶ 53.
- Hydrogen Explosion: Hydrogen explosion is considered a credible mechanism for early primary containment failure and therefore contributes to the Early Containment Failure event node. The subordinate fault tree for CFE includes component and

³⁶ Id.

³⁷ Even for Unit 2, whose status is not as clearly understood as those of Units 1 and 3, estimates are that 93%-99% of the radionuclide inventory remains contained. Entergy Decl. at ¶ 39.

operator action failures that could result in a buildup of hydrogen in the primary containment. Entergy Decl. ¶ 59.

- Containment Breach: Both early and late containment breach are considered in the Pilgrim PSA and contribute to accident sequences in CAPBs 4 through 15. See ER Table E.1-5; Entergy Decl. ¶ 58.
- Large Radioactive Releases: The Pilgrim SAMA analysis takes into account very large radioactive releases that far exceed the radioactive releases from Fukushima. Entergy Decl. ¶¶ 47-48, 63-69.

In short, the Pilgrim SAMA analysis fully takes into account potential accidents involving failure to vent the torus, hydrogen explosions, and primary containment breach. Pilgrim Watch has provided no evidence which disputes the adequacy of the Pilgrim SAMA analysis, as detailed in Entergy's Declaration.

Third, as noted above, the SAMA analysis considers large radioactive release. Pilgrim Watch contends that the "offsite consequences of containment failure would be huge" and asserts that such huge consequences were not properly factored into Entergy's SAMA. PW Request at 24; see also id. at 34, Gunderson Affidavit ("huge amounts of radiation will be released"). Indeed, the Pilgrim SAMA analysis has considered much larger radioactive releases than those that occurred at Fukushima. As discussed in Dr. Okula's Declaration supporting Entergy's Answer opposing Pilgrim Watch's first request for a hearing on a post-Fukushima SAMA Contention,³⁸ comparison of the radiological releases assumed in the single-unit Pilgrim SAMA analysis shows that the Pilgrim SAMA analysis accounts for severe accident releases that more than bound the reported releases from all of the Fukushima units. Sowdon/O'Kula Declaration

³⁸ Entergy's Answer Opposing Pilgrim Watch's Request for Hearing on Post-Fukushima SAMA Contention (June 6, 2011); Declaration of Dr. Thomas L. Sowdon and Dr. Kevin R. O'Kula in Support of Entergy's Answer Opposing Pilgrim Watch Request for Hearing on Post-Fukushima SAMA Contention (June 6, 2011) ("Sowdon/O'Kula Declaration").

at ¶ 39; see also Entergy Decl. at ¶¶ 65-66. This is further confirmed by comparison of the fraction of the radionuclides in the core released from Fukushima compared to fraction of radionuclides in the core assumed to be released in the Pilgrim SAMA analysis. Entergy Decl. at ¶¶ 67-68. Thus, the Pilgrim SAMA analysis has considered much larger radioactive releases than those that occurred at Fukushima.

Fourth, other ancillary claims raised in Pilgrim Watch's request (buried piping, DTV redundancy, filtering of any radioactive release, and passive venting) are immaterial for the reasons set forth in Entergy's Declaration at ¶¶ 70-77.

In summary, there would be no changes in the results of the SAMA analysis even considering the claims asserted by Pilgrim Watch. In order for an additional SAMA to become potentially cost-beneficial, the benefit (risk averted) would need to increase by more than a factor of two, i.e., more than 100%.³⁹ Pilgrim Watch has alleged no facts that would make another SAMA potentially cost-beneficial.

B. PILGRIM WATCH DOES NOT MEET THE LATE FILING STANDARDS IN 10 C.F.R. § 2.309(c)

Pilgrim Watch's late-filed contention should not be admitted because Pilgrim Watch has shown no good cause for its extreme tardiness, and a balancing of the remaining factors in 10 C.F.R. § 2.309(c) does not outweigh this failure.

Section 2.309(c)(1) provides that non-timely contentions will not be entertained absent a determination by the Board that the contentions should be admitted based upon a balancing of the following factors:

³⁹ See Testimony of Dr. Kevin R. O'Kula and Dr. Steven R. Hanna on Meteorological Matters Pertaining to Pilgrim Watch Contention 3 at A47 (ENT000001) (Jan. 3, 2011) (ADAMS Accession No. ML110600866) ("Entergy Meteorological Testimony").

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1)(i)-(viii). In keeping with the Commission's disfavor of contentions submitted after the initial filing, these factors are "stringent." Oyster Creek, CLI-09-7, 69 N.R.C. at 260, citing Calvert Cliffs, CLI-06-21, 64 N.R.C. at 33. "Late petitioners properly have a substantial burden in justifying their tardiness." Nuclear Fuel Services, CLI-75-4, 1 N.R.C. at 275.

Commission case law places most importance on whether the petitioner has demonstrated sufficient good cause for the untimely filing.⁴⁰ "Good cause" has been consistently interpreted to mean that a proposed new contention be based on information that was not previously available, and was timely submitted in light of that new information. Millstone, CLI-09-5, 69 N.R.C. at 125-26, citing Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 N.R.C. 1, 6 (2008).

⁴⁰ Watts Bar, CLI-10-12 at 4; Private Fuel Storage, CLI-00-02, 51 N.R.C. at 79.

For the same reasons that the contention is not timely under sections 2.326(a)(1) and 2.309(f)(2), Pilgrim Watch has failed to demonstrate good cause for its very late-filed contention. The purported lessons learned from the Fukushima Daiichi accident identified by Pilgrim Watch are not sufficient grounds to submit a late contention here. The potential for the buildup of containment pressure, hydrogen explosion, failure or delay in attempting to vent the containment because of operator error, DTV failure or inoperability, potential containment failure, and the resulting offsite consequences were fully considered in the Pilgrim SAMA analysis filed with the license renewal application. In effect, Pilgrim Watch could have challenged these very untimely concerns at the outset of this proceeding.

Because it has failed to demonstrate good cause, Pilgrim Watch must make a “compelling” showing with respect to the other factors. Comanche Peak, CLI-93-4, 37 N.R.C. at 165. In other words,

A petitioner’s showing must be highly persuasive; it would be a rare case where [the Commission] would excuse a non-timely petition absent good cause.

Watts Bar, CLI-10-12, at 4 (footnote omitted).

In balancing the remaining late-filed contention factors, the Commission grants considerable weight to factors seven and eight.

We regard as highly important the intervenor's ability to contribute to the development of a sound record on a particular contention. We also are giving significant weight to the potential delay, if any, which might ensue from admitting a particular contention.

Consumers Power Co. (Midland Plant, Units 1 and 2) LBP-82-63, 16 N.R.C. 571, 577 (1982) (citations omitted), citing South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 N.R.C. 881, 895 (1981); see also Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 N.R.C. 241, 246-47 (1986).

Both the seventh and eighth factors weigh heavily against admitting Pilgrim Watch's new contention.

With regard to the seventh factor, adding a new contention will, without a doubt, delay and broaden the proceeding significantly. Pilgrim Watch claims no inappropriate delay, arguing that the seventh factor addresses "only that delay which can be attributed directly to the tardiness of the petition." PW Request at 28; citing Long Island Lighting Company (Jamesport Nuclear Power Station), ALAB-292, 2 N.R.C. 631, 650 n.26 (1975) and South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 N.R.C. 420, 425 (1981). Pilgrim Watch's reliance on Jamesport and Summer is, however, mistaken because both cases looked to whether the new contentions would significantly delay and broaden the proceeding.

In Jamesport, the Oil Heat Institute of Long Island, Inc. ("OHILI") appealed to the Atomic Safety and Licensing Appeal Board ("Appeal Board") from a order of the licensing board denying OHILI's untimely amended petition for leave to intervene in the construction permit proceeding. Contrary to Pilgrim Watch's claim, the Appeal Board did specifically look to whether new issues would be introduced into the hearing, and whether the proceeding would be delayed, in evaluating the seventh factor. The Appeal Board stated:

Since its intervention petition introduces no new issues, the scope of the proceeding would not be broadened by OHILI's participation. And, discovery not having as yet been instituted, there is no real danger that the commencement of the evidentiary proceeding would be delayed.

Jamesport, ALAB-292, 2 N.R.C. at 650 (emphasis added) (footnote omitted). Moreover, while exhibiting characteristics that posed "no real danger" of delaying the evidentiary proceeding, i.e., no new issues and discovery having been instituted, the Appeal Board nevertheless rejected the petition because OHILI failed to make a substantial showing of good cause for failure to file its petition on time.

Here, unlike OHILI's petition, Pilgrim Watch's Request would significantly broaden and delay the proceeding. At the eleventh hour, Pilgrim Watch seeks to re-open the record to litigate completely new issues and requests that Entergy completely "redo" the SAMA analysis. In these circumstances, there can be no doubt that admitting Pilgrim Watch's late-filed contention poses a significant "real danger" that this proceeding would be further delayed significantly. Id.

Summer likewise does not support Pilgrim Watch's position. The licensing board in that case admitted several late filed contentions in an ongoing proceeding, reasoning that similar contentions had already been admitted which had not yet gone to hearing and were not even susceptible to summary disposition. See Summer, LBP-81-11, 13 N.R.C. at 425-30. The licensing board further explained that the petitioner could be admitted without making "any special accommodations...that would result in delaying the hearing," such as extending discovery or rescheduling the hearing date. Id. at 425. Thus, in Summer, there were similar contentions to be litigated and the proceeding would not be delayed by the admission of the late-filed contentions. In contrast, here, of the two contentions admitted in this proceeding, Contention 1 is resolved and the record is closed in Contention 3. There are no remaining contentions to be litigated. Clearly, starting another hearing from scratch to litigate a new contention at this very late hour would delay issuance of the renewed license by months.

Concerning the eighth factor, it cannot be reasonably expected that Pilgrim Watch will assist in developing a sound record. "[W]hen a petitioner addresses this ... criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." Watts Bar, CLI-10-12 at 10-11 (footnote omitted). Here, Pilgrim Watch merely asserts that it will rely on government documents, discovery documents from Contention 1, and expert testimony from Arnold

Gundersen, but fails to set out with any particularity the precise issues it plans to cover or what its expert testimony will address. PW Request at 21 n.23, and 29. Mr. Gundersen merely states that he has “reviewed the Request for Hearing and support its content.” Gundersen Affidavit ¶ 9. This obviously falls far short of the Commission’s expectation for a summary of proposed testimony.

Further, Pilgrim Watch nowhere identifies any witness or summarizes any witness testimony for its many assertions regarding the buildup of containment pressure, hydrogen explosion, failure or delay in attempting to vent the containment because of operator error, DTV failure or inoperability, potential containment failure, and the resulting offsite consequences. And although Mr. Gundersen may “support” Pilgrim Watch’s DTV related assertions, as discussed above, the education, training, and experience that Mr. Gundersen cites in his Affidavit do not, on their face, qualify him to support those assertions. Indeed, a closer look at the contention reveals that neither Pilgrim Watch nor Mr. Gundersen is capable of adding value to the record. Pilgrim Watch asserts that the Fukushima Daiichi Units 1-3 DTVs failed to operate. PW Request at 2 (“[a]ll three failed” to open). Pilgrim Watch is incorrect. As explained above and in Entergy’s Declaration, the containments at Fukushima Units 1 and 3 were vented, and it is yet unclear – even to TEPCO – whether containment venting on Unit 2 was successful. Entergy Decl. ¶¶ 19-25. With the support of Mr. Gundersen, Pilgrim Watch further incorrectly asserts that “all three containments failed” in each of the three Fukushima Units. PW Request at 2, 6; Gundersen Affidavit at ¶ 13 (“Pilgrim’s DTV is unlikely to save Pilgrim’s containment and huge amounts of radiation will be released”). Again, based on the official reports of the accident, Pilgrim Watch and Mr. Gundersen are incorrect. Entergy Decl. ¶¶ 34-41. Pilgrim Watch’s so-called expert failed to recognize the key distinction between the primary containment, which

houses the reactor vessel, and the reactor building structure (or secondary containment). In short, Pilgrim Watch makes no showing of any ability to meaningfully contribute to a sound record on any issue discussed in its Request.

Thus, factors one, seven and eight – the three most significant factors – count heavily against Pilgrim Watch. The other factors in 10 C.F.R. § 2.309(c)(1) are less important (see, e.g., Diablo Canyon, CLI-08-1, 67 N.R.C. at 6; Comanche Peak, CLI-93-4, 37 N.R.C. at 165), and therefore cannot outweigh Pilgrim Watch’s failure to demonstrate good cause or meet factors seven and eight.

C. PILGRIM WATCH’S NEW CONTENTION DOES NOT MEET THE STRICT CONTENTION ADMISSIBILITY REQUIREMENTS

Even if Pilgrim Watch had met the standards for reopening a closed record and the standards for a late contention (which it has not), its contention would still be inadmissible because it does not satisfy the pleading requirements in 10 C.F.R. § 2.309(f)(1). Even if a proponent of a new contention satisfies the requirements of 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c), it must still demonstrate that its new contention satisfies the admissibility standards in 10 C.F.R. § 2.309(f)(1)(i)-(vi). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 N.R.C. 355, 362-63 (1993).

10 C.F.R. § 2.309(f)(1) requires that a hearing request for any contention be set forth with particularity and:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in connection is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and

(vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1)(i)-(vi). Pilgrim Watch's contention does not meet these standards.

1. The Late Filed Contention is Not Within the Scope of the Proceeding and Material to the Findings that the NRC Must Make

The late-filed contention is inadmissible because Pilgrim Watch fails to demonstrate that it is within the scope of the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii). Although Pilgrim Watch asserts that its contention challenges the Pilgrim SAMA analysis under the National Environmental Policy Act ("NEPA"),⁴¹ Pilgrim Watch in fact appears to be arguing that Entergy must implement SAMAs in order to protect the public health and safety. For example, Pilgrim Watch claims that, if the Pilgrim SAMAs is not re-evaluated using the assumptions demanded in the late contention, then

there will be an unacceptable risk to the environment jeopardizing the health, safety, property and finances of Petitioners' members who live, recreate, conduct business and own property within the vicinity of the Pilgrim Nuclear Power Station.

⁴¹ See PW Request at 4-5.

PW Request at 26 (emphasis added). Pilgrim Watch also asserts that this contention focuses on “the increased probability of a severe accident and larger offsite consequences, both justifying additional mitigation.” PW Request at 5 (emphasis added). Pilgrim Watch further alleges that “[n]o rational SAMA could provide any excuse for not requiring filtering the DTV.” Id. at 9.

These allegations exceed the limited scope of the safety review in a license renewal proceeding. See PPL Susquehanna, LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 N.R.C. 281, 307-09 (2007) (“The Commission chose, rather, to focus the NRC license renewal safety review ‘upon those potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs.’”) citing Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 7 (2001). Certainly, nothing in NEPA “requires” implementation of any SAMAs. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353 (1989). See also Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 N.R.C. 373, 388 n.77 (2002) (“NEPA does not mandate the *particular decisions* an agency must reach, only the process the agency must follow while reaching its decisions.”) (emphasis in original) (citations omitted).

For the same reason, Pilgrim Watch fails to demonstrate that this contention is material to the findings that the NRC must make to support license renewal. There is no requirement in the NRC’s license renewal rules that an applicant must take action to mitigate severe accident risk in order to protect the public health and safety. See 10 C.F.R. Part 54. Consequently, Pilgrim Watch’s contention also fails to meet 10 C.F.R. § 2.309(f)(1)(iv).

2. The Late-Filed Contention Is Inadequately Supported

The late-filed contention is also inadmissible because it is not supported by a concise statement of alleged fact or expert opinion, in contravention of 10 C.F.R. §§ 2.309(f)(1)(v). Pilgrim Watch does not present any expert opinion supporting its new contention. Pilgrim Watch claims that it will rely on testimony from Mr. Gundersen (whose Affidavit accompanying the Request says nothing other than that he supports the Pilgrim Watch Request statements), government documents, and discovery documents from Contention 1. PW Request at 21 n.23, and 29. These vague references do not provide the requisite, concise statement of facts or expert opinion. A mere reference to documents, without any explanation of their implications or significance, does not provide an adequate basis for a contention. See Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 348 (1998).

In addition, Pilgrim Watch also relies on anonymously written articles posted to a number of websites, but this is insufficient to support admission of a contention. Without any indication of who authored the article, there is no way of knowing whether the article's assertions are made by a competent person. The articles make assertions of the type that clearly require expert support.

3. The Late Filed Contention Fails to Provide Sufficient Information Showing that a Genuine Dispute Exists On a Material Issue of Law or Fact

Pilgrim Watch's new contention is also inadmissible because it is not supported by sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact, as required by 10 C.F.R. §§ 2.309(f)(1)(vi). Pilgrim Watch's arguments are insufficient to demonstrate a genuine material dispute with Pilgrim's SAMA analysis. Under the NRC's Rules of Practice, "a protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that such a dispute exists. The protestant must

make a minimal showing that material facts are in dispute, thereby demonstrating that an ‘inquiry in depth’ is appropriate.” 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) (quoting Conn. Bankers Ass’n v. Bd. of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980)).

As a threshold matter, Pilgrim Watch does not make any minimal showing that its claims would affect the outcome of the Pilgrim SAMA analysis and are therefore material. The Commission has defined a “material” issue as meaning one where “resolution of the dispute would make a difference in the outcome of the licensing proceeding.” 54 Fed. Reg. at 33,172 (emphasis added). Here, the PW Request sets forth nothing to establish that the asserted deficiencies would, if accounted for as requested by Pilgrim Watch, alter the result of the SAMA analysis.

In order for an additional SAMA to become potentially cost-beneficial, the benefit (risk averted) would need to increase by more than a factor of two, i.e., more than 100%. See Energy Meteorological Testimony at A47. Pilgrim Watch asserts no facts and provides no explanation showing that, were its concerns accounted for, the risk averted would even approach that mark. As the Commission has held, it would be unreasonable to trigger full adjudicatory proceedings on a SAMA contention where a petitioner has done nothing to indicate the relative cost and benefit. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 N.R.C. 1, 12 (2002). Indeed, as explained by the Commission in this proceeding, Pilgrim Watch must show that it is “genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated” CLI-10-11 at 39. Pilgrim Watch has not met this burden. For all of its claims that the SAMA analysis purportedly fails to consider the probability of DTV failure, or the likely cost of failure, brought to light by the Fukushima Daiichi accident,

nowhere does Pilgrim Watch ever indicate the costs that would be incurred if the SAMA analysis were to consider that information. Nor does Pilgrim Watch make any showing that the cost-benefit analysis using this information would change the results of the SAMA analysis.

Pilgrim Watch's contention fails for another material reason. Pilgrim Watch fails to dispute or otherwise challenge, in light of Fukushima, the adequacy of the severe accident releases evaluated in the Pilgrim SAMA analysis. The severe accident releases used for the Pilgrim SAMA analysis represent a range of releases from small to very large based on the different possible severe accident scenarios for the Pilgrim plant, and include releases that are many times greater than the releases that occurred at the Fukushima reactors. Entergy Decl. ¶ 47. The severe accident releases assumed for the Pilgrim SAMA analysis more than bound the reported releases from Fukushima. *Id.* at ¶¶ 63-69. The overall source term in the case of a severe accident includes the type and amount of radionuclides, the heat energy in the plume associated with the release, the height of the release, the timing of release, and the maximum plume duration. *Id.* at ¶ 48. Pilgrim Watch does not even address the type and amount of radionuclides contained in releases, the heat energy in the plume associated with a releases, the height of releases, and the timing of releases considered in the SAMA analysis. Nor does Pilgrim Watch make any showing that consideration of its concerns would increase the benefit (risk averted) by a factor of more than two that is necessary to change the results of the SAMA analysis. As such, Pilgrim Watch's newly proffered contention fails to raise a material dispute.

In light of the large margin inherent in the Pilgrim SAMA analysis, Pilgrim Watch was required to have pled facts to establish the materiality of its asserted deficiencies. Such a showing – necessary to avoid a meaningless “EIS editing session[,]” of the type the Commission has warned against (see Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba

Nuclear Station, Units 1 and 2), CLI-03-17, 58 N.R.C. 419, 431 (2009)) – is absent from the PW Request. Mitigation alternatives need only be evaluated in “sufficient detail to ensure that environmental consequences” of the proposed project “have been fairly evaluated.” Id. (footnote omitted). In fact, Pilgrim Watch provides no basis to suggest that Pilgrim’s SAMAs have been unfairly evaluated due to asserted failure of the DTVs or its other alleged deficiencies in the Pilgrim SAMA analysis. Pilgrim Watch provides no information demonstrating that any of its alleged deficiencies are sufficiently significant to alter the SAMA analysis. Pilgrim Watch provides no basis – no analysis or expert opinion – demonstrating that any of its allegations would make a difference in the outcome.

IV. CONCLUSION

In sum, Pilgrim Watch’s Request should be denied because Pilgrim Watch has not met the standards for reopening the record, has not met the standards for raising a late contention, and has not met the standards for an admissible contention. The purported lessons learned from the Fukushima Daiichi accident that Pilgrim Watch uses as justification for this late filing appear to be nothing more than a pretext for raising issues that could have been pled at the outset of this proceeding.

For all of the foregoing reasons, Pilgrim Watch’s Request should be denied.

/Signed Electronically by Paul A. Gaukler/

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Dated: June 27, 2011

Counsel for Entergy

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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|--|---|------------------------|
| In the Matter of |) | |
| |) | |
| Entergy Nuclear Generation Company and |) | Docket No. 50-293-LR |
| Entergy Nuclear Operations, Inc. |) | ASLBP No. 06-848-02-LR |
| |) | |
| (Pilgrim Nuclear Power Station) |) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of Entergy’s Answer Opposing Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima and the Declaration of Joseph R. Lynch, Lori Ann Potts, and Dr. Kevin R. O’Kula in Support of Entergy’s Answer Opposing Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima, both dated June 27, 2011, were provided to the Electronic Information Exchange for service on the individuals below, this 27th day of June, 2011.

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